IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CARLA HESTER	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION NO. 6:04CV36**
	§	
GRAHAM, BRIGHT, & SMITH, A	§	
PROFESSIONAL CORPORATION, aka	§	
GRAHAM, BRIGHT & SMITH, P.C.	§	
R. SPENCER SHYTLES and AQUA	§	
FINANCE, INC.	§	
Defendants.	§	

ORDER

Before the Court is Plaintiff's motion for attorney's fees and costs (Doc.70). On January 28, 2004, Plaintiff filed the instant suit alleging that Defendants Graham, Bright, & Smith and R. Spencer Shytles filed an action to collect upon a consumer debt in violation of the Fair Debt Collection Practices Act, ("FDCPA"), 15 U.S.C. §1692i, and that Defendant Aqua Finance, Inc. ("Aqua") was liable for distant forum abuse under the Texas Deceptive Trade Practices Act, ("DTPA"), Tex. Bus. & Com. Code §17.46(b)(23). On April 1, 2005, the Court recommended that Graham, Bright & Smith and Mr. Shytles be found liable for violating the FDCPA and Aqua be found liable for violating the DTPA. On April 22, 2005, the District Judge signed an order adopting this recommendation.[1]

Having determined that Defendants were liable to Plaintiff, on May 21, 2005, the Court held

[1]On May 23, 2005, the parties consented to proceed before a U.S. Magistrate Judge (Doc. 63) and the case was assigned to U.S. Magistrate Judge McKee (Doc. 64). Subsequently, the case was assigned to Magistrate Judge Love (Doc. 83).

a trial regarding the relief that Plaintiff seeks. At the trial, the Court ordered that Plaintiff file a motion for attorney's fees and costs by June 3, 2005, and Defendants were given a June 10, 2005 deadline by which to respond.

The Fair Debt Collection Practices Act, 15 U.S.C. §1692k, states that an individual bringing a successful claim under the FDCPA may recover up to $1,000 statutory damages. 15 U.S.C. §1692k(a)(2)(A). In considering what the prevailing plaintiff may recover, the Court may consider the "frequency and persistence of noncompliance by the debt collector, the nature of the noncompliance, and the extent to which the noncompliance was intentional." Furthermore, the FDCPA also awards to the prevailing party "the costs of the action, together with reasonable attorney's fees determined by the Court." 15 U.S.C. §1692k(a)(3). Similarly, under the DTPA, a consumer who "prevails shall be awarded court costs and reasonable attorneys' fees." Tex. Bus. & Com. Code §17.50(d).

It is unclear from Plaintiff's motions exactly what relief she is seeking and against whom she is seeking it. At trial, Plaintiff stated that she was not pursuing actual or economic damages. Under the Texas DTPA, in order to "prevail" and be entitled to attorney's fees, a plaintiff must prove he is a consumer, the act must be prohibited under the DTPA, and the act complained of must be a producing cause of actual damages. Tex. Bus. & Com. Code §17.50. In this case, since Plaintiff did not prove actual damages against Defendant Aqua, no attorney's fees and costs may be recovered against that Defendant. *Gulf States Utilities Co. v. Low.*, 79 S.W.3d 561, 567 (Tex. 2002).

If Plaintiff is successful in establishing actual or statutory damages under 15 U.S.C. §1692k(a), she may then recover the "costs of the action, together with a reasonable attorney's fee as determined by the Court."15 U.S.C. §1692k(a)(3). Prior to the trial, the Court had already found that Defendants Graham, Bright, & Smith, PC and R. Spencer Shytles had violated the FDCPA. At the May 21, 2005 trial, Plaintiff produced four witnesses that testified to Defendants' violations of the FDCPA, and filed 23 exhibits showing a rather lengthy history of noncompliance by the Defendants. After due consideration, the Court finds that Defendants Graham, Bright & Smith, PC and R. Spencer Shytles have engaged in extensive violations of the Federal Deceptive Trade Practices Act and therefore awards Plaintiff $1,000 statutory damages.

Next, the Court must decide what amount of reasonable attorneys' fees and costs to award to the prevailing party. The Court first comes up with a figure referred to as the "lodestar." *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996). The Court calculates the "lodestar" utilizing a two-step process, requiring the Court to "determine the reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating lawyers." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 323-24 (5th Cir. 1995)(quoting *Hensley*, 461 U.S. 424). In order to determine reasonable rates, the Court should consider the attorneys' regular rates as well as prevailing rates. *Kellstrom*, 50 F.3d at 328 (citing *HJ Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991)). After the Court reaches the lodestar figure, it may then adjust that figure upward or downward depending on several factors. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Plaintiff's attorneys filed affidavits with the motion for fees, stating that attorney Richard Tomlinson worked 168.3 hours on this case, and that attorney Craig Jordan worked 4.95 hours. Each attorney's affidavit states that the time spent was necessary to this litigation, including research, responding to motions, filing motions, pursuing discovery, attempting to resolve discovery disputes, and appearing at depositions, the scheduling conference and trial. Furthermore, Plaintiff contends that the Defendants' resistance forced Plaintiff's counsel to expend more time than ordinarily would be taken in this type of case.

Plaintiff's counsel also itemized the work performed by the attorneys, and the various entries list the time spent for each task. Defendants claim that Plaintiff's counsel requests payment for too many hours for a case of this type, but it is not surprising that Plaintiff's counsel gave more effort and spent more time in this case because the extensive pleading history establishes that Defendants vigorously contested the case. *See e.g. City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Wolf v. Frank*, 555 F.2d 1213, 1217 (5th Cir. 1977). Defendants also complain that a handful of the entries in the attorneys' logs represent unnecessary work. However, after reviewing the affidavits submitted by Plaintiff's attorneys, Mr. Tomlinson and Mr. Jordan, the Court finds the hours spent in representation to be reasonable for this case overall. However, the Court will not count the time Mr. Tomlinson spent specifically on the claim against Aqua because the Court has already determined that Plaintiff is not entitled to attorney's fees under the DTPA. Although Plaintiff's DTPA and FDCPA claims overlap a great deal and it would be impractical to separate the time spent on each claim, the itemization provided by Mr. Tomlinson contains several entries describing services rendered that relate solely to the claim against Aqua.[2] These entries represent 14.55 hours of work,

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5/31/04: Conferred with Carla Hester re: plea in abatement 0.10; Drafted affidavit to be signed by R. Tomlinson and attached to response to plea in abatement 0.25; Drafted order denying plea in abatement 0.10; Drafted opposition to plea in abatement 0.75; Researched law on 17.505 presuit notice on DTPA damage claims 0.75; Drafted cover letter to opposing counsel to accompany opposition to plea in abatement 0.1. 6/1/04: Filed opposition to plea in abatement, Richard Tomlinson's affidavit and proposed order electronically 0.15. 6/6/04: Drafted set of interrogatories to Aqua 0.35. 7/16/04: Drafted fax memo to opposing counsel to request more time to response to Defendant Aqua Finance's motion to summary judgment 0.1. 7/25/04: Drafted fax memo to opposing counsel inquiring about incoming of his response to preview fax asking for more time to respond to motion for summary judgment 0.1. 7/26/04: Checked Pacer and with clerk for motion for summary judgment 0.1; Drafted e-mail to opposing counsel asking if he would oppose motion for more time to respond to motion for summary judgment 0.1; Drafted motion and order for extension of time to respond to motion for summary judgment 1.25; Drafted cover letter to opposing counsel to accompany motion and order 0.1. 7/29/04 Conferred with Craig Jordan re: motion for extension of time and legal argument in opposition to reducing Mr. Tomlinson's total hours worked from 168.3 to 153.75.

After determining the number of hours, the Court must next determine whether the attorneys' hourly rates are reasonable. The affidavits, which include each attorney's regular charged rates, state that Mr. Tomlinson's hourly rate is $200.00 and Mr. Jordan's is $300.00. Each claims that his is reasonable for an attorney of his experience and that these rates are typically charged in the East Texas area. The Court finds that Mr. Tomlinson's rate of $200.00 is reasonable considering the work that he performed on this case. However, the Court finds that Mr. Jordan's rate of $300.00, despite his experience and expertise, is unreasonable in regard and in proportion to the work he performed on the case. He states in his affidavit that his work consisted of "research at the Dallas County Courthouse necessary to determine whether Defendants regularly engaged in debt collection" as well as assisting Mr. Tomlinson at trial. *Aff. Of Craig Jordan, Pl. Motion for Attorney's Fees and Costs,* page 1. Assisting the lead counsel at trial and doing basic research at the county courthouse does not justify an hourly rate 50% higher than Mr. Tomlinson's, who was lead counsel. Accordingly, the Court adjusts Mr. Jordan's hourly rate to $200.00 per hour.

Therefore, the Court finds that Mr. Tomlinson has reasonably expended 153.75 hours of work at $200.00 per hour, for a total of $30,750.00. The Court further finds that Mr. Jordan has expended 4.95 hours at a rate of $200.00, for a total of $990.00. The Court further finds that $1050.00 is reasonable for Mr. Tomlinson's costs associated with travel, and that $300.00 fairly represents Mr. Jordan's travel costs.

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motion for summary judgment 0.1. 10/17/04: Worked on motion for summary judgment response 4.0. 10/18/04: Drafted DTPA portion of response to motion for summary judgment response 1.75. 10/19/04: Finished opposition to Defendant Aqua Finance's motion for summary judgment 2.5. 10/21/04: Drafted supplemental opposition to motion for summary judgment and cover letter .5; Filed supplemental opposition to Defendant Aqua Finance's motion electronically 0.15. 3/11/05: Finished drafting DTPA section of motion for partial summary judgment 1.25.

After reaching these figures, the Court may adjust the total, "lodestar" figure upwards or downwards depending on several factors. *Johnson*, 488 F.2d at 717-19. In *Johnson*, the Fifth Circuit issued the following guidelines for a court to determine the reasonableness of an award of attorneys fees and gave twelve considerations to be taken into account: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to the acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and abilities of the attorneys, the undesirability of the case, the nature and length of the professional relationship with the client, and awards in similar cases. *Id*. at 719.

In this case, the Court finds no reason to deviate from the lodestar figures reached in the preceding paragraphs according to the guidelines given in *Johnson*. Although the case was not particularly novel or complex, the procedural history reflects not insignificant opposition on behalf of Defendants which would naturally increase the necessary time spent by Plaintiff's counsel. In addition, the comparatively small statutory award to Plaintiff should not prejudice a higher attorneys fees figure. In fact, in this case, the Court has awarded the maximum statutory damages to Plaintiff. In short, after reviewing the motions by the parties, as well as the history of this case, the Court finds nothing remarkable or novel that would make it necessary to adjust the lodestar amount.

Therefore, after due consideration, it is ORDERED that Plaintiff's motion for attorneys and costs (Doc. 70) is GRANTED in part, and that Defendants Graham, Bright, & Smith, PC and R. Spencer Shytles pay the amount of $1,000.00 to Plaintiff, $31,800.00 to Richard Tomlinson for attorney's fees and travel, $1,290.00 to Craig Jordan for attorney's fees and travel, and pursuant to

28 U.S.C. § 1920, $1,109.14 to Richard Tomlinson for filing fees, cost of pro hac vice application, cost of service of summons, and court reporter costs.

So ORDERED and SIGNED this 31st day of March, 2006.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE